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No. 87-836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PAINEWEBBER GROUP, INC.,

Petitioner,

vs.

TOMMY E. PARKER, as Custodian for KIMBERLY M. PARKER, and JAMES L. SMITH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

THE ELEVENTH CIRCUIT'S OPINION IS RIPE FOR REVIEW AND RAISES QUESTIONS OF NATIONAL IMPORTANCE THAT NEED TO BE ADDRESSED BY THIS COURT

Contrary to respondents' assertions (*see* Respondents' Brief in Opposition to Petition for Writ of Certiorari ("Response") at 15-18), the Eleventh Circuit's decision reversing the District Court's denial of class certification as to respondents' claims pursuant to Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Securities and Exchange Commission

Rule 10b-5, 17 C.F.R. § 240.10b-5 (1987), as well as its determination that it had jurisdiction pursuant to 28 U.S.C. § 1292(b) to review the District Court's denial of class certification, are ripe for review by this Court. The Eleventh Circuit made a number of final determinations that (a) are fundamental to the further conduct of the case; (b) raise issues of national importance concerning the class action device, the federal securities laws and federal appellate jurisdiction; and (c) have created a split between the Fifth and Eleventh Circuits on the question of certifying a class. The Eleventh Circuit's final determinations include:

(a) Respondents' complaint alone was sufficient to satisfy their burden under Fed. R. Civ. P. 23(b)(3) of proving common factual issues predominated over individual ones.

(b) Petitioner's evidence relating to the predominancy requirement of class certification is *irrelevant* in ruling on respondents' motion for class certification.

(c) Respondents' actual reliance on factors other than the integrity of the market is irrelevant to their fraud-on-the-undeveloped-market claims under Rule 10b-5(a) and 10b-5(c) because they have alleged that the Petro-Lewis limited partnership interests could not have been marketed but for a fraud.

(d) Respondents' reliance on the oral representations of their broker is irrelevant because they have alleged a common course of conduct and, therefore, common issues predominate on the Rule 10b-5(b) claims.

See Kirkpatrick v. J. C. Bradford & Co., 827 F.2d 718, 721-25 (11th Cir. 1987)(App. A-5-12). The Eleventh Circuit, without any explanation, has also finally determined that it had discretionary jurisdiction to review the District Court's denial of class certification under 28 U.S.C. § 1292(b).

These determinations by the Eleventh Circuit are undoubtedly fundamental to the further conduct of this case. The District Court denied class certification because it found that common issues did not predominate. The Eleventh Circuit held that, as a matter of law, common issues did predominate and that the District Court therefore "abused its discretion in ruling that the requirements of Rule 23(b)(3) were not satisfied in this case." *Kirkpatrick*, 827 F.2d at 725 (App. A-12).

The Eleventh Circuit's decision is not only fundamental to the further conduct of *this* case, it also raises issues of paramount national importance. Indeed, this Court has already expressed its concern with the class certification and "fraud-on-the-market" issues presented in this case in granting *certiorari* in *Basic, Inc. v. Levinson*, 107 S. Ct. 1284 (1987). As set forth in the Petition at 6-8, this Court should therefore consider the present case in conjunction with its consideration of *Basic*. Indeed, the necessity for reviewing the fraud-on-the-market theory is more compelling in this case than in *Basic* since this case involves a claim of fraud on an "*un*developed market."

Moreover, the Eleventh Circuit in the present case held that a securities fraud case may be certified as a class action whenever the complaint invokes the proper litany, *irrespective* of the evidence regarding whether the requirements of Rule 23 have been satisfied. Would-be plaintiffs are much more likely to bring class action lawsuits knowing that they will not be put to the test of *proving* that common issues predominate. Allowing the certification of a class on the basis of mere allegations will thereby spawn a new wave of securities litigation targeted at securities issuers and brokerage firms, and Rule 23 of the Federal Rules of Civil Procedure will become a substantive club in the hands of plaintiffs.

The Eleventh Circuit's exercise of jurisdiction under 28 U.S.C. § 1292(b) also raises an important question of appellate jurisdiction: should a denial of class certification be reviewable under 28 U.S.C. § 1292(b)? As this Court has recognized, the scope of jurisdiction under 28 U.S.C. § 1292(b) "raises an important

question of federal appellate jurisdiction." *Tidewater Oil Co. v. United States*, 409 U.S. 151, 153 (1972) (interlocutory orders in Expediting Act cases not reviewable under 28 U.S.C. § 1292(b)).

Given the substantial impact of the Court of Appeals decision on petitioner, and the nationally important issues it raises, respondents' argument that the issues presented herein are not "ripe" for review is unavailing. 28 U.S.C. § 1254(1) specifically provides for review by *certiorari* "before or after rendition of judgment or decree." In the exercise of this power, the Court has often reviewed interlocutory decisions, "[w]here there is an important and clear-cut issue of law which is fundamental to the further conduct of the case and which would otherwise qualify as a basis for certiorari . . . ." *Michael v. United States*, 454 U.S. 950, 951 (1981) (White, J. dissenting). *See, e.g., California Brewers Ass'n v. Bryant*, 444 U.S. 598, 604-05 (1980) (Court reviewed order by appeals court reversing dismissal and remanding for further proceedings); *Carey v. Piphus*, 435 U.S. 247, 252-53 (1978) (Court reviewed order by appeals court remanding for factual determinations by District Court).[1]

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[1] *See also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).

II.

THE ELEVENTH CIRCUIT CONTRAVENED THIS COURT'S HOLDING IN *GENERAL TELEPHONE CO. OF SOUTHWEST v. FALCON* AND IMPROPERLY HELD THAT THE RESPONDENTS' 10b-5 CLAIMS WERE CERTIFIABLE BASED SOLELY ON THE ALLEGATIONS OF THE COMPLAINT

A. *The Eleventh Circuit's Reversal Of The District Court's Denial Of Class Certification Was Based Solely On The Allegations Of The Complaint*

Respondents incorrectly claim that the Eleventh Circuit gave "careful consideration of the entire record in this case, including the evidence offered at the class action hearing" and that the Court of Appeals "simply viewed the record differently than did the District Court." (Response at 24). In fact, the Eleventh Circuit intentionally ignored the record. It clearly intended that the mere *allegation* of a "scheme to defraud" should be sufficient to satisfy the predominancy requirement of Fed. R. Civ. P. 23(b)(3) in holding that the denial of certification was improper because "*the complaints alleged* that the defendant brokerage firms and individual officers engaged in a common course of conduct to misrepresent, by affirmative acts and omissions, the financial condition of Petro-Lewis," *Kirkpatrick*, 827 F.2d at 724 (App. A-10), and the "*complaint alleges* that a security not traded on the open market could not have been issued but for the fraud of defendants." *Kirkpatrick*, 827 F.2d at 723 (App. A-8). Respondents' attempt to rehabilitate the Eleventh Circuit's decision by arguing that the Court looked beyond the complaint is unavailing on this record.

Accordingly, it was unprecedented and contrary to this Court's holding in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), for the Eleventh Circuit, on the basis of just the allegations in the complaint, to have reversed the District Court's holding that individual issues predominated on

respondents' Section 10(b) and Rule 10b-5 claims. The District Court reached this legal conclusion on the basis of its factual finding that respondents relied on oral representations of their broker and not on the integrity of the market.[2] *See Sanders v. Robinson Humphrey/American Express, Inc.*, 634 F.Supp. 1048, 1062-63 (N.D. Ga. 1986) (App. D-25-26); *Sanders v. Robinson Humphrey/American Express*, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶92,880, at 94,272 (N.D. Ga. July 8, 1986) (App. E-10-11). The Eleventh Circuit did *not* find error in the District Court's factual finding. Rather, it faulted the District Court's legal analysis because the District Court examined the deposition testimony and other evidence and did not rely solely upon the allegations in the complaint. *See Kirkpatrick*, 827 F.2d at 724 (App. A-10).

B. *Oral Representations Lie At The Heart Of Respondents' Claims*

Respondents argue that the statements made to them by their individual broker are not part of their case and that those statements are, therefore, irrelevant. *See* Response at 19, 21. However, respondents' complaint specifically alleges that petitioner "made numerous uniform statements of fact and assurances to plaintiffs and members of the class . . ." Second Amended Complaint ¶37. Accordingly, it is the *respondents* who put these statements in issue. The District Court thereafter found

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[2] Although respondents have represented to this Court that it is "uncontroverted" that the oral representations of individual brokers did not vary from the prospectuses (*see* Response at 21 n.15) and that "respondents came forward with uncontroverted evidence that they relied on the integrity of the market when they made their purchases" (*see* Response at 28), this is not the case. In fact, petitioner has argued throughout this litigation that the oral representations relied upon by the respondents varied from those in the prospectuses and that there is strong evidence that respondents did not rely on the integrity of the market. In addition, the District Court found no evidence that the representations made by the brokers were uniform throughout the putative class, *see Sanders*, 634 F. Supp. at 1062 (App. D-25-26), or that respondents relied on the integrity of the market. *See Sanders*, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH), ¶92,880, at 94,272 (App. E-10-11).

that respondents relied on the representations of their broker and *not* on the Petro-Lewis prospectus. *Sanders*, 634 F. Supp. at 1062 (App. D-25-26). Respondents cannot logically claim that these representations – which *they* put in issue and on which (according to their own testimony) *they* relied – are not part of their claim for fraud.

Contrary to respondents' statement of the law (*see* Response at 21-22), the vast majority of courts have denied class certification in cases such as this one, where the potential class relied primarily on oral representations. *See, e.g., Shivangi v. Dean Witter Reynolds, Inc.*, 825 F.2d 885, 890 (5th Cir. 1987); *Grainger v. State Security Life Insurance Co.*, 547 F.2d 303 (5th Cir. 1977), *cert. denied*, 436 U.S. 932 (1978); *Clark v. Watchie*, 513 F.2d 994, 999 (9th Cir.), *cert. denied*, 423 U.S. 841 (1975); *In re Hotel Telephone Charges*, 500 F.2d 86, 88-89 (9th Cir. 1975); *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 882 (5th Cir. 1973); *Glick v. E.F. Hutton & Co.*, 106 F.R.D. 446, 450-55 (E.D. Pa. 1985); *Seiler v. E.F. Hutton & Co.*, 102 F.R.D. 880, 889 (D.N.J. 1984); *Masri v. Wakefield*, 106 F.R.D. 322, 324-25 (D. Colo. 1984); *McHan v. Grandbouche*, 99 F.R.D. 260, 266 (D. Kan. 1983); *In re Scientific Control Corp. Securities Litigation*, 71 F.R.D. 491, 501-05 (S.D.N.Y. 1976). The rationale underlying these many decisions is that where a class of putative plaintiffs relies on oral representations there are bound to be individual issues of materiality, falsity and reliance. There was no reason for the Eleventh Circuit to depart from this firmly established precedent and create a split in the Circuits in ruling on respondents' motion for certification.

Respondents failed to present any evidence that similar oral representations were made to the purported class. *See Sanders*, 634 F. Supp. at 1062 (App. D-25). In light of that failure, the District Court properly found that respondents had failed to carry their burden of demonstrating the predominance of common issues.

III.

THE ISSUE OF WHETHER THE COURT OF APPEALS IMPROPERLY TOOK JURISDICTION OF THIS APPEAL PURSUANT TO 28 U.S.C. § 1292(b) IS NOT MOOT

This Court has previously recognized that the scope of the courts of appeals' jurisdiction under 28 U.S.C. § 1292(b) presents an important issue of federal appellate jurisdiction. *See Tidewater Oil Co. v. United States*, 409 U.S. 151 (1972). Avoiding this issue, respondents state, without argument, that the "entire issue" of whether the Court of Appeals improperly took jurisdiction of this appeal pursuant to 28 U.S.C. § 1292(b) "was rendered moot when the Eleventh Circuit rendered its decision on the merits of the appeal." Response at 30. That statement is simply wrong. Petitioner has argued both in the Court of Appeals and in this Court that interlocutory review by a court of appeals of the denial of class certification cannot materially advance the ultimate termination of the litigation and that it was therefore improper for the Eleventh Circuit to assert jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(b). *See* Petition at 16-18. The fact that the Court of Appeals rendered a decision despite the impropriety of its exercising such jurisdiction does not, of course, make this appeal moot. To the contrary, a reviewing court is always free to examine the exercise of jurisdiction by a lower court and should vacate the lower court's decision if its exercise of jurisdiction was improper. *See, e.g., Colorado River Water Conservation District v. United States*, 424 U.S. 800, 806 (1976) (reviewing and reversing discretionary ruling of court of appeals which held that abstention was inappropriate and affirming the district court's dismissal of the complaint); *Financial General Bankshares, Inc. v. Metzger*, 680 F.2d 768 (D.C. Cir. 1982) (reviewing and reversing district court's exercise of discretionary pendent jurisdiction). Accordingly, if the Court of Appeals improperly asserted jurisdiction, a challenge to that assertion of jurisdiction is not mooted by the court's having already rendered a decision.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition for a Writ of Certiorari, respondents' arguments in opposition to the Petition should be rejected, and the writ should issue.

Dated: New York, New York
January 4, 1988

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